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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 281

SARAH P. (COLBY) APPLEBY, *Petitioner*

v.

BENJAMIN COLBY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Sarah P. Appleby, petitioner, and appellant below, prays that a writ of certiorari issue to review the decree of the Court of Appeals of Maryland, entered on May 20, 1958.

OPINIONS BELOW

The decree of the Circuit Court for Montgomery County, Maryland, was entered on November 6, 1957, (R. 14). The Courts opinion per Judge Kathryn J. Lawler, is unreported but is included in the Record herein. (R. 10). The opinion of the Circuit Court of

Appeals of Maryland, filed May 20, 1958 (Appendix 1a), has not yet been reported.

JURISDICTION

The opinion of the Court of Appeals of Maryland, per Judge Horney, was filed May 20, 1958 (Appendix 1a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. ~~2101(c)~~ 1254 (1)

QUESTIONS PRESENTED

(1) Whether in a Maryland proceeding involving validity, under Article IV, Section 1, of the United States Constitution of a decree of divorce granted by the State of Nevada, a defendant (petitioner) who more than a year previous had abandoned residence and domicile in Maryland and never returned to that State (except several daytime visits (a) to attend a luncheon, (b) to get clothes and (c) to testify), despite such abandonment and actual residence elsewhere could be held as a matter of law to have thereafter continued as a domiciliary of Maryland.

(2) Whether the Maryland Court's determination that the decree of the Nevada Court was null and void was correct in the circumstances; or if that decree was entitled to full faith and credit in Maryland under Article IV, Section 1, of the Constitution of the United States?

(3) Whether respondent's acts in connection with the Nevada litigation precluded his right to ask the Circuit Court for Montgomery County, Maryland, to set aside the judgment of the Court of Nevada?

STATUTES INVOLVED

The United States Constitution, Article IV, Section 1, which provides:

> "Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article 35, Section 9, of the Maryland Code, which provides:

> "*Adverse Party May Be Called, Interrogated And Impeached.* In any suit or proceeding in equity in any Court of this State any party may call as a witness any adverse party * * * and interrogate him by leading questions and contradict him in every respect as if he had been called by the adverse party."

The parties below jointly prepared the following—

AGREED STATEMENT OF UNDISPUTED FACTS

Appellee, husband, Benjamin Colby, and appellant, wife, Sarah P. Colby, were married in Chicago, Illinois, on November 24, 1927. Three children were born of the marriage, namely, Benjamin Colby, Jr., Frederick Jordan Colby, and Sarah Rob Colby, the latter two children being minors at the time of the filing of the bill of complaint herein, aged, respectively, eighteen years and fifteen years. The parties lived together as husband and wife and resided at 5815 Cedar Parkway, Chevy Chase, Montgomery County, Maryland, for something over four years prior to March 4, 1955.

On March 4, 1955, appellant, wife, without prior notice to appellee, husband, in company with her minor

daughter, Sarah Rob Colby, left the home in Chevy Chase, leaving a note to appellee. Appellant and her daughter stopped at Glencoe, Illinois, the home of appellant's mother, and went from there to Las Vegas, Nevada, where she arrived with her daughter on March 7, 1955.

Appellee engaged a detective in Washington, D. C., who went to Nevada and reported to him.

Appellee, husband, went to Las Vegas, Nevada, approximately March 20, 1955, and saw appellant. Appellee returned to his home in Montgomery County, Maryland, and went back to Las Vegas in April, 1955. He consulted a lawyer there to let him know when she (appellant) actually went up to the court to get a divorce. He also consulted lawyers in Washington, D. C.

On April 19, 1955, appellant filed suit for divorce *a vinculo matrimonii* in the Eighth Judical District Court of the State of Nevada, in and for the County of Clark, on the ground of extreme cruelty, mental in nature.

On June 9, 1955, appellee was served in Washington, D. C., with the process of the Nevada Court.

On June 30, 1955, the Nevada decree of divorce was granted to appellee, appellant having filed no answer or appearance in the proceedings.

On September 21, 1955, appellee filed a bill of complaint in the Circuit Court for Montgomery County, for divorce *a mensa et thoro*, on the ground of abandonment. Appellant, being served with the subpoena in Montgomery County, Maryland, answered, denied appellee's right to relief, and claimed that she had been absolutely divorced in Nevada, in accordance with the certified copy of the decree attached to the answer.

that the Circuit Court was without jurisdiction in the premises, and that appellee's bill, therefore, should be dismissed.

Testimony was taken before one of the standing examiners of the court and, upon the conclusion of appellee's (plaintiff below) testimony, motion for summary judgment was filed by appellant on the ground that the case contained no genuine dispute as to any material fact and that the defendant was entitled to judgment as a matter of law. This motion was overruled by the court.

On or about July 12, 1955, subsequent to the Nevada decree, appellant went from Las Vegas, Nevada, to Glencoe, Illinois, the home of her mother, and to Washington, D. C., on or about August 8, 1955. While at a luncheon with a friend at the Chevy Chase Club in Montgomery County, appellant was served with process in the instant case, as above stated.

On October 9, 1955, appellant returned to Las Vegas, Nevada.

On or about December 1, 1955, appellant again went to visit with her mother at Glencoe, Illinois, and to Washington, D. C., about December 7, 1955. She returned to Las Vegas in January, 1956, stopping at Glencoe, Illinois, to visit with her mother on or about January 6, and arrived in Las Vegas, January 17, 1956.

On February 21, 1956, appellant married Scott B. Appleby at Clark County, Las Vegas, Nevada.

Appellant never returned to sleep in Montgomery County or in the State of Maryland after leaving the Maryland home of the parties on March 4, 1955.

The following additional facts appear from the Record. Petitioner, Sarah Colby Appleby, was called as a witness for plaintiff, respondent here. Plaintiff's counsel stated that he was calling her "as an adverse party" and wanted "to exercise full rights to cross-examine her as an adverse party" (R. E21). [Article 35, Section 9, of the Maryland Code provides that an adverse party may be so called; but under Maryland law the party calling the adverse party is bound by the latter's testimony unless clearly impeached. Infra, page 11]. Petitioner testified that she went to Nevada "to live" (R. 21), that her plans when she went to Nevada were to live there indefinitely (R. E38). She never intended to return to Chevy Chase (Maryland) and did not want to be in the house where she had lived with her husband because of the terrible memories and associations, and that continued to be her mental disposition up to the time she testified (R. E88, 107). Apart from any other period, it was her intention to remain in Nevada through the summer of 1955 (R. E89). When respondent Colby went to Las Vegas to visit her, according to both his and her testimony, petitioner told him she was not coming back (R. 89). Through further examination of petitioner as his witness, counsel brought out that she had written several letters to her children in which she stated she could not come to *Washington, D. C.*, until after her divorce had been granted (R. 58, 59) and, under date of July 25, 1955, she wrote to respondent at the Chevy Chase, Maryland, address telling him she had to make *a visit* to Washington and asking him if he would have the Chevy Chase house put completely in her name so she could stay there. (R. 135).

On cross-examination defendant (petitioner) made the following statements: She had not lived at the

Chevy Chase address since she left March 4, 1955 (R. 81), planned to continue to live in Nevada indefinitely (R. E38, 81) and has never spent a night in Maryland since that date. She described her activities in Las Vegas, painting, church, Red Cross work, etc., and stated she was employed as a relief clerk at the Dunes Hotel Gift Shop beginning in October, 1955 (R. 22, 73). She referred to her activities in Maryland before leaving there March 4, 1955, and stated she notified the Nominating Committee of the Chevy Chase Garden Club that her name should not be on a ballot. She did not resign from the Ladies' Board of the House of Mercy "because I (she) didn't want to cause a lot of talk" but did resign from the Board of YWCA in writing (R. 24, 63). She applied for registration for an Austin automobile in Maryland February 24, 1955, but left it in Maryland for her son who was in college to use (R. 29, 30). She gave up her Las Vegas apartment upon receiving the divorce decree but rented a room in Las Vegas in which she left her personal belongings and went to see her mother in Chicago. At this time she knew respondent had six months within which to appeal the Nevada decree (R. 45, 48). She wanted her children to have the benefit of their social contacts in and around Chevy Chase, Maryland during Christmas holidays 1955 (R. 53, 56). In that connection, she visited Washington and stayed for a while at Christmas time in a house in the District of Columbia rented by her [illegible] in both their names. This was cheaper than having the children come to Las Vegas (R. 51). She worked in Nevada and had a social security card which she obtained there (R. 73). She bought an automobile while on a visit to Washington, D. C., in August, 1955. Her son, Benjamin, drove it to Nevada for her and she obtained

Nevada license plates and had the automobile insured in Nevada (R. 74, 77). Also, she applied to Federal authorities in Reno, Nevada, for extension of time to file here 1955 Federal income tax return (R. E75). Before going to Nevada she voted in Maryland, but qualified as a voter in Nevada while residing in Las Vegas (R. 81). While in Las Vegas petitioner looked at houses for sale. Her aunt had sent her money for down payment on a house in Las Vegas, but she did not buy as prices were too high (R. 89, 116). The record shows that petitioner retained a residence in Nevada until February 21, 1956, when she was married, in Las Vegas, Nevada, to Scott B. Appleby (R. 88, 89, 102). Respondent, as plaintiff in the Circuit Court, testified in his own behalf that he was personally served with process in the divorce action in Washington, D. C., on June 9, 1955 (R. 6), after volunteering by telegram to submit himself for service (Defendant's Exs. A & B, R. 172). He went to Nevada twice while petitioner was living there, the first time about March 20, 1955, and the second time in April, 1955, when he stayed about seven or eight days (R. 16). He retained a lawyer in Las Vegas, Russell Taylor, Esquire. Respondent instructed Mr. Taylor to let him know when petitioner went to court to get a divorce. He knew he could intervene in the Nevada action and get a jury trial (R. 18). Respondent did not formally appear in the Nevada proceedings or file any answer to the complaint (R. 18). He refused to answer questions put to him by petitioner's counsel as to whether his Nevada lawyer gave him a summary of the Nevada law and his rights thereunder. On June 6, 1955, respondent, plaintiff below, sent a telegram to petitioner, defendant below, addressed to her Las Vegas, Nevada, residence, advising her where and under what circum-

stances he might be served with process in the Nevada litigation (R. 172).

A decree of divorce a vinculo was entered in favor of petitioner on June 30, 1955 in the Eighth Judicial District, Nevada (R. 157).

On November 6, 1957, the Circuit Court for Montgomery County, Maryland, per Judge Kathryn Lawler, entered a decree declaring the divorce *a vinculo matrimonii* granted to petitioner in the Eighth Judicial District for the State of Nevada, "null, void and no effect in law or equity" and awarded plaintiff, respondent here, a divorce *a mensa et thoro* from defendant, petitioner here. On May 20, 1958, the action of the Circuit Court for Montgomery County, Maryland, was affirmed by the Court of Appeals of Maryland.

ARGUMENT IN SUPPORT OF PETITION

Basic Principles of Law Involved

Petitioner assumes that certain principles of law announced in the second Williams case, *Williams* v. *State of North Carolina*, 325 U.S. at page 234 (65 S. Ct. at page 1097) and in the case of *Cook* v. *Cook*, 342 U.S. 126 at page 128; 72 S. Ct. 157 at page 159 are in effect and applicable here, namely--

(1) Under the full faith and credit clause, a state court judgment is entitled to the same credit and effect in other states that it has in the state where it was pronounced when jurisdiction of the subject matter or person is not clearly impeached in other states.

(2) "If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself."

Quotation in *Cook* v. *Cook*, *supra*, from the opinion of Justice Stone in *Adams* v. *Sanger*, 303 U.S. 59, 62; 58 S. Ct. 454, 456.

(3) The burden of undermining the verity which a Nevada decree of divorce imports rests heavily upon the assailant.

It is submitted that the courts below ignored these principles in finding, contrary to the record, that petitioner did not acquire a bona fide domicile in Nevada.

The Nevada Decree Was Not Open to Collateral attack If Appellant Was a Bona Fide Resident of Nevada When She Obtained Her Divorce

Even though respondent was neither personally served within Nevada nor entered an appearance in the Nevada action the Nevada divorce decree is not open to collateral attack if Petitioner was a bona fide domiciliary or resident of Nevada at the time she brought her action there and obtained her divorce—

Sherrer v. *Sherrer*, 334 U.S. 343, 68 S. Ct. 1087;
Cook v. *Cook*, 342 U.S. 126, 72 S. Ct. 157.

The rule that the bona fide residence of plaintiff in the divorcing state gives the Court there jurisdiction even though defendant was not personally served in that state or appeared in the action is spelled out in Mr. Justice Frankfurter's dissent in the *Cook* case 342 U.S. 126, 72 S. Ct. 157.

See also *Sutton* v. *Leib*, 342 U.S. 402, 72 S. Ct. 398.

Petitioner Had the Right to Go to Nevada to Obtain a Divorce

The Court of Appeals of Maryland has well stated the law to be that a spouse may change his domicile for the purpose of obtaining a divorce:

"* * * A state never could forbid a domicilliary to change his domicil in order to obtain a divorce * * *." *Epstein* v. *Epstein*, 66 A. 2d 381 at p. 383.

See also *Cheever* v. *Wilson*, 76 U.S. 108, 9 Wall 108; *Williams* v. *State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207.

Petitioner Abandoned Her Maryland Domicile and Never Returned to That State; Hence, She Acquired a Legal Domicile in Nevada Where She Resided for More Than a Year

The Agreed Statement of Undisputed Facts shows that petitioner "never returned to sleep in Montgomery County or in the State of Maryland after leaving the Maryland home of the parties on March 4, 1955."

Furthermore, by plaintiff's (respondent's) own examination of petitioner (defendant) as his witness, it was established that at the time she left Maryland on March 4, 1955, up through the time of her testimony more than a year later, she had no intention of ever returning to Maryland.

Article 35, Section 9, of the Maryland Code provides—

"*Adverse Party May Be Called, Interrogated And Impeached.* In any suit or proceeding in equity in any Court of this State any party may call as a witness any adverse party * * * and interrogate him by leading questions and contradict him in every respect as if he had been called by the adverse party."

The Court of Appeals of Maryland has declared that under the above statute a litigant calling the adverse party is bound by the latter's evidence unless clearly impeached. *Murphy* v. *Stubblefield*, 133 Md. 23; 104 A.T. 259.

Persons are domiciled (in a state) in which they live who have no fixed and definite intention to return and make their homes where they were formerly domiciled. *Rogers* v. *Rogers*, 76 U.S. App. D.C. 297 (see 2, 3 page 298) citing *D. C.* v. *Murphy*, 314 U.S. 441, 62 S. Ct. 303.

In the Williams cases and in others wherein this Honorable Court has denied Full Faith and Credit, it will be noted that the plaintiff in the Nevada case returned to the state of original domicile after the decree was rendered in Nevada and again took up residence in the state of original domicile.

Petitioner not only testified as a witness for the plaintiff that when she left Maryland she had no intention of ever returning there, but respondent Colby testified that she so advised him when he went to see her in Las Vegas. She had irrevocably left Colby and given up her residence in Montgomery County. She had no place in Montgomery County or in the State of Maryland to which she could return and live for even one night without returning to Colby, who continued to occupy and assert dominion over the former marital residence at 5815 Cedar Parkway, Chevy Chase. In certain letters that she wrote to her children she did refer to the fact that she expected to travel to *Washington, D. C.* but in every instance the detailed testimony will show that she was going there temporarily for a special purpose and that after those special purposes had been accomplished she had the intention to and did return to her apartment in Las Vegas. She actually lived in Las Vegas for about a year, March 7, 1955, to the time when she was married in April, 1956. She has never returned to the State of Maryland except for the purpose of getting some

additional personal belongings, testifying in this case, and once (when she was served in this suit) for the purpose of having luncheon at the Chevy Chase Club with a friend.

In Story's Conflict of Laws, 7th Edition, Sec. 46, it is stated:

> "If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is deemed his place of domicile notwithstanding he may entertain a floating intention to return at some future period."

The situation in the Colby case is very similar to one which was adjudicated in *Goodloe v. Hauck*, 72 App. D.C. 287, wherein the opinion was written by Justice Vinson, later Chief Justice of the Supreme Court of the United States. In that case a wife, partner to a District of Columbia marital domicile, had gone to the State of Virginia and secured a divorce after residing there for the statutory period. Almost immediately thereafter she returned to the District of Columbia and remarried. The man she married in the District was one who had encouraged her to secure the Virginia decree, and he later asked the court to annul his marriage on the ground that his wife's Virginia divorce from her first husband was invalid as she was not a bona fide resident of Virginia. In dismissing the plaintiff's suit, Justice Vinson stated:

> "Under our previous decisions the decree of the Virginia court granting the appellee a divorce from her first husband will be recognized here if it is valid under the law of Virginia, i.e., if she was domiciled in and a bona fide resident of Virginia as required by the divorce statute there, and if no

fraud was committed on the Virginia court in respect to Hawk's alleged desertion. The District Court expressly found that the appellee was a bona fide resident of Virginia and its finding that the decree was valid amounts to a finding that Hawk did desert her and that no fraud was practiced on the Virginia court in this respect. Those findings are amply supported by the record and cannot therefore be disturbed by this court on appeal.

"That leaves only the question whether the appellee by moving to Virginia acquired a Virginia domicile. Neither the fact that she went there motivated by a desire to obtain a divorce, nor the fact that she left some time after securing it forecloses this issue if it can be said she had at one time during her residence there an intention to remain for an indefinite period. Although on the facts as stated that might seem doubtful, the District Court in an independent inquiry concluded, as the Virginia court originally, that she did acquire a Virginia domicile. In light of the strong presumption in favor of the Virginia court's finding on this issue, the character of the evidence introduced in the District Court, and the rule that District Court findings in this type of case will not be disturbed unless manifestly erroneous, we are unwilling to disturb that finding. We need not, however, rest our decision on that ground alone for we are of the opinion that under the circumstances the Virginia court's finding that the appellee acquired a Virginia domicile is conclusive in this litigation."

The law abhors a vacuum. Can it be said in the face of her clear intention to abandon Maryland as a residence and domicile, the fact that she never returned there, and her actual residence in Nevada, that between March 4, 1955 and February 21, 1956 petitioner was without a domicile?

The burden rested heavily upon plaintiff below (respondent) to prove that petitioner was not domiciled in Nevada and that the Nevada courts were without jurisdiction to hear and determine her complaint. It is submitted that he utterly failed to sustain that burden.

Fallacy in Opinions Below

Both the Circuit Court for Montgomery County and the Court of Appeals of Maryland seemed to think that a casual expression of intention on part of petitioner sometime to leave Nevada and make a home in the *District of Columbia* was equivalent to an intention on her part to return to the *State of Maryland*. In her written opinion the Circuit Court Judge clearly indicates that she felt an intention on the part of the former Maryland resident, petitioner, to ultimately settle in the District of Columbia was the equivalent of re-establishing her Maryland domicile, stating parenthetically "Montgomery County is considered by me to be part of the greater metropolitan area of our Nation's Capital." This observation obviously was intended to support the Judge's view that petitioner's two visits to Washington while allegedly maintaining a Nevada residence were equivalent to returning to Maryland, as she refers to "the Washington area", "the Washington metropolitan area", "Montgomery County, Maryland, and its environs" and "the District of Columbia" at four different points in her opinion in support of the theme that "an early return to the original domicile after obtaining a 'tourist divorce'" was applicable in this case (R. 10, 11).

The Court of Appeals of Maryland also stresses in its opinion petitioner's visits to the District of Colum-

bia and her stay there during the Christmas 1955-56 holidays in a house leased by her aunt there as though those visits constituted a reaffirmation of her Maryland domicile.

The Question Whether Petitioner Was a Bona Fide Domiciliary of Nevada Is One for the Nevada Court

The question as to whether the petitioner was actually a domiciliary of the state which granted her a divorce is one for the court which granted the divorce. *Williams* v. *North Carolina*, 65 S. Ct. 1092 at pages 1096 and 1097.

The Supreme Court of Nevada in many cases has held that a wife may acquire and maintain a domicile separate from that of her husband; *Merritt* v. *Merritt*, 160 P. 22, 164 P. 644; 40 Nevada 385; and that the residence of plaintiff in a divorce action is a question of fact to be determined by the Nevada Trial Court, *Blakeslee* v. *Blakeslee*, 168 P. 950; 41 Nevada 235.

In *Walker* v. *Walker*, 198 P. 433; 45 Nevada 105, the Supreme Court of Nevada said at p. 109:

> There is no rule of law which prevents one from changing his domicile in order to facilitate his obtaining a divorce, or to secure other advantages he may think the law of the new domicile may afford him."

The Plaintiff Below Did Not Show Petitioner's Nevada Domicile to be Other Than Bona Fide

Respondent, having asked Maryland to declare invalid the judgment of the State of Nevada, and thus attacked the constitutionality of the decree of the Nevada Court, had the burden of proving his contention to be correct. This burden rests heavily upon him

(*Williams* v. *State of North Carolina*, 325 U.S. 225, 65 S. Ct. 1092; *Cook* v. *Cook*, 342 U.S. 126, 72 S. Ct. 157. This burden was not sustained.

The Respondent failed to show of what jurisdiction other than Nevada petitioner was a domiciliary. For one to be able to retain his domicile in one state upon moving to another state and residing therein he must always retain an intention to return—even though the time of return be indefinite. *Sweeney* v. *District of Columbia*, 72 App. D.C. 30, cert. den. 310 U.S. 631, 60 S. Ct. 1082 (see (5), (6) page 33 and footnote 10 same page).

Had petitioner actually returned to Maryland to live the Maryland cases of *Walker* v. *Walker*, 125 Md. 649; *Epstein* v. *Epstein*, 66 A. 2d 381, and *Brewster* v. *Brewster*, 144 A. 2d 53, may properly have supported the Chancellor's finding that her residence in Nevada was not *bona fide*. But there is no place in the law for the reasoning that because according to the Chancellor "Montgomery County (Maryland) is considered by many as a part of the greater Metropolitan Area of our Nation's Capital", domiciliaries of Montgomery County, Maryland are likewise domiciliaries of Washington, District of Columbia and nearby Virginia, and *vice versa*, or, that a domiciliary of Montgomery County Maryland, retains his domicile there when he abandons that county and state and goes to another state where he lives for a while and then "returns" to live in the District of Columbia or nearby Virginia.

Were the Chancellor's statement of the law correct it would be impossible for a domiciliary of Montgomery County, Maryland, to relinquish or abandon that domicile by going to the District of Columbia or Virginia to live or *vice versa*.

"* * * To acquire a domicil of choice the law requires the physicial presence of a person at the place of the domicile claimed, coupled with the intention of making it his present home. When these two facts concur, the change in domicil is instantaneous. Intention to live permanently at the claimed domicil is not required. If a person capable of making his choice honestly regards a place as his present home, the motive prompting him is immaterial. Restatement of Conflict of Laws, secs. 15, 22." *Spurgeon* v. *Mission State Bank*, (CCA 8) 151 F. 2d 702 at pp. 705, 706.

See also *Hanson* v. *Hanson*, 151 N.Y.S. 861, 863, 88 Misc. 244. *Shilkret* v. *Helvering*, 78 U.S. App. D.C. 178; *DeMarcos* v. *Overholzer*, 74 App. D.C. 42.

The record shows petitioner went to Nevada and stayed there for more than the requisite period of time required by that state to give it jurisdiction to entertain her action for divorce. It also shows *inter alia* that she obtained employment there; that she qualified as a Nevada voter; that she asserted her Nevada domicile in her Federal income tax return; that she accepted $2,000 from her aunt to use as a down payment on a house in Nevada; that she applied for and obtained a social security card enabling her to seek employment in Nevada; and that in September 1955 while on the visit to the District of Columbia during which she was served with process herein while attending a luncheon at the Chevy Chase Club she still maintained living quarters in Nevada.

In the agreed statement of undisputed facts it is provided—

"Appellant never returned to *sleep* in Montgomery County or in the State of Maryland after

leaving the Maryland home of the parties on March 4, 1955." (italicized word insisted upon by appellee).

The record is clear tha since March 4, 1955, appellant has never been in Mo. gomery County, Maryland, except to pick up some art cles from her former home on Cedar Parkway; to attend the luncheon at Chevy Chase Club at which she was served with process herein; and for the purpose of testifying in this case.

The Actions of Respondent Foreclosed His Right to Collaterally Attack the Decree of the Nevada Court

This case is factually unique among the reported cases involving collateral attacks on divorce decrees:

Benjamin Colby followed his wife to Las Vegas, Nevada (R. 16). He employed a detective to cover his wife's activities while in Nevada and report to him from time to time thereon (R. 17). He also consulted a lawyer in Nevada (R. 18) and employed counsel in Las Vegas to keep him informed of the progress of appellant's divorce action against him (R. 18). He also talked with an attorney in Washington, D. C. (R. 19). Colby went to Nevada *twice* between the time his wife arrived there and June 9, 1955, when he was personally served with process of the Nevada Court in Washington, D. C. (R. 16, 17). But after being so served he stayed away from Nevada (R. 16). He even went so far as possible to lead his wife to think he would appear in the Nevada action (R. 18, 19). He then telegraphed her that he would not (R. 172). He even assisted his wife in procuring her Nevada divorce to the extent that he advised her when and where he would be available for service of process by telegraphing her on June 6, (1955):

> "In case you wish to reach me am now at home and office at usual hours." (R. 172.)

and again on June 10, 1955:

> "Referring to my second telegram Wednesday keep in mind that if I had not decided against appearing and had maintained my decision to ask for jury trial you would have had to stay there at least twelve months please consider this in your relations with the children." (R. 172.)

Mr. Colby was in Nevada twice before he was served. He could easily have accepted service there and raised before the Nevada Court whatever questions concerning that Court's jurisdiction or the merits of his wife's action he thought he had. He did not do that.

He flouted the Nevada Courts to the extent that he made sure service would be had upon him outside that state and he did not raise in the Nevada Court (the normal and proper forum) the question of its jurisdiction.

Colby's bill in the Montgomery Circuit Court prayed for a divorce *a mensa et thoro* and the custody of his minor children

> "for such periods and in such manner, including the right to determine the future education of said minors, as the Court may determine to be for their best interests," (R. 4)

but at argument he dropped completely his prayer for custody (R. 14—last paragraph of Trial Court's opinion).

If he had sincerely wished to obtain even limited custody of his two minor children (which obviously he did not wish to do else he would not have dropped that

issue) he could and should have initiated an action therefor in the Maryland Courts without raising the question of the validity of the Nevada decree.

The question of the custody of the minor Frederick Jordan Colby was not raised or adjudicated in the Nevada proceedings and therefore that question could have and should have been raised and determined without regard to the Nevada proceedings.

With respect to the custody of Sarah Rob (which was prayed in the Nevada proceedings) the Nevada Court provided—

> "The Court hereby retains jurisdiction of this action and the parties hereto for the sole purpose of making such other and further orders regarding the care, custody, control and maintenance of the said minor child of the parties as to the Court may from time to time seem just and proper." (R. 157.)

Therefore, with respect to the daughter's custody, inasmuch as the Nevada custody decree was not final there was no need or reason for Colby to collaterally attack the divorce decree of the Nevada courts in his Maryland action. The action he should have brought and the one the lower court should have entertained was one for modification of the custody decree of the Nevada court. (*State of New York ex rel. Halvey* v. *Halvey*, 330 U.S. 610, 67 S. Ct. 903.)

If Colby had any sincere desire to get petitioner to resume her married life with him a law suit would seem the means least likely to accomplish that end. However, it is obvious from the Bill that that was not his purpose as he asks the Court for a legal separation—thus acknowledging that he is not desirous of healing the marital breach.

It is respectfully submitted that Colby's real purpose in bringing this case was to try to successfully litigate the question he felt confident he could not successfully raise in the Nevada Court: The jurisdiction of that Court to entertain petitioner's action for divorce against him. But the question of the jurisdiction of the Nevada Court to entertain her action against him was one of fact to be determined by that Court. *Fleming* v. *Fleming*, 36 Nev. 135, 134 Pac. 445.

The law of estoppel makes the acts and conduct of a party binding against him whenever they should be so and will not permit him to assert any claim to the contrary. Thus, he himself makes the law of his case and he must abide the consequences. *Hill* v. *Farmers & M. Nat. Bank*, 97 U.S. 450.

The acts of the respondent, Colby, were such as to shock the conscience of a Court of Equity:

Boulden v. *Lanhan*, 29 Md. 200;
Elgin v. *Housing Authority of City of Frederick*, 52 F. Supp. 250;
Rody v. *Doyle*, 29 A. 2d 290, 181 Md. 195.

The Supreme Court of the United States Has Never Sustained a Collateral Attack on an "Ex-Parte" Divorce Decree at the Instance of One Who Was Physically Present in the Granting State With Every Opportunity to Litigate the Jurisdictional Question in the Forum

Respondent Colby had every opportunity to raise the jurisdictional question in the State of Nevada without any hardship whatsoever to himself as he was personally physically present within the State upon two occasions during the period between the time petitioner went there to live and filed her suit for divorce, and was represented by counsel. But instead of so litigating he chose to remain silent then and after

Nevada had acted invoke the assistance of the Courts of Maryland to have the Nevada decree nullified.

In cases involving the permissible limitations on the full faith and credit clause this Honorable Court has (since hearing the first Williams case in 1942, *Williams* v. *State of North Carolina*, 317 U.S. 287; 63 S. Ct. 207) heard twelve cases in which the validity of the judgment of one State was attacked in an action brought in another State.

The first of these cases was the second Williams case (*Williams* v. *State of North Carolina*, 325 U.S. 225, 65 S. Ct. 1092) decided in 1945. In that case the Supreme Court upheld the right of the State of North Carolina to discharge its clear duty of punishing persons wound within its borders and subject to its laws for contravention thereof.

After the second Williams case came the case of *Eisenwain* v. *Pennsylvania*, 325 U.S. 279, 65 S. Ct. 1118. Here the husband after having left his domicile and wife in Pennsylvania gone to Nevada and obtained a divorce and then gone to Ohio to live returned to Pennsylvania and the jurisdiction of its courts to sue for termination of the support order his wife had obtained there prior to entry of the Nevada decree. His contention was that the Nevada divorce terminated the support order under the Pennsylvania law which holds that a support order does not survive divorce. The Supreme Court held that the Nevada divorce decree did not invalidate the earlier support order of the Pennsylvania Court. The concurring opinions of Associate Justices Douglas and Rutledge clearly distinguish the Eisenwain case from the second Williams case and explain that the jurisdictional foundation for a decree

in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extra-territorial effect. As Mr. Justice Douglas stated (at pages 1119-1120 of 65 S. Ct.):

> "We held in Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207 * * * that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being prosecuted in North Carolina for living with the one woman who Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. See Yarborough v. Yarborough, * * *. But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. * * * The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States. * * * The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States. * * * One must give way in the larger interest of the federal union. But the same con-

fliet is not necessarily present when it comes to maintenance or support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision for support or none at all."

In *Griffin* v. *Griffin*, 327 U.S. 220, 66 S. Ct. 556, the question before the Court was the validity of a New York judgment declaring a wife entitled to recover a fixed sum as arrears in alimony awarded under a previous order of the New York Courts which judgment having been docketed without notice (personal or constructive) to the defendant the wife had attempted to collect in an action brought thereon in the District of Columbia. The Court held the docketing of the *in personam* judgment by the New York Court invalid for want of due process.

The question before the Court in *People of the State of New York ex rel. Halvey* v. *Halvey*, 330 U.S. 610, 67 S. Ct. 903, was not the validity of the Florida divorce decree obtained by a former New York resident, but the power the New York Courts had to modify the Florida Court's award of custody of the minor child of the parties. The Court held that the award of custody being open to modification in the Court of Florida was also subject to modification in the Courts of New York, so far as the full faith and credit clause was concerned.

The question for determination in the case of *Sherrer* v. *Sherrer*, 334 U.S. 343, 68 S. Ct. 1087, was whether a citizen and resident of Massachusetts who had appeared and contested the Florida divorce suit instituted by his wife, and there contested the jurisdiction of the Florida court could relitigate the jurisdictional question in the State of Massachusetts. The Court held he could not.

The question in *Coe* v. *Coe*, 334 U.S. 378, 68 S. Ct. 1094, was whether the Nevada judgment awarding divorce and alimony to a wife (who was formerly a resident of Massachusetts) on the cross-claim she had filed to the divorce suit instituted by her husband in which she had personally appeared was subject to collateral attack in the Courts of Massachusetts. The Court held it was not.

In *Estin* v. *Estin*, 334 U.S. 541, 68 S. Ct. 1213, where after a wife resident in New York had obtained there a support order against her husband who then went to Nevada and there divorced her, the question for determination was whether the Nevada Court absent personal service upon the defendant could adjudicate the wife's rights in the New York judgment. In deciding that the Nevada Court could not the Supreme Court as it had done in *Eisenwain* v. *Pennsylvania*, 325 U.S. 279, 65 S. Ct. 1118 clearly explained the difference between the personal service within the jurisdiction of the trial Court required to support a money judgment and the constructive service of process without the jurisdiction of the Court which is all that is required to give the trial court the power to enter judgment in an action for divorce. To like effect is *Kreiger* v. *Kreiger*, 334 U.S. 555, 68 S. Ct. 1221.

In the case of *Rice* v. *Rice*, 336 U.S. 674, 69 S. Ct. 751, the Supreme Court did declare the divorce decree

of the Nevada Court null and void in Connecticut. But by so doing it enabled Connecticut to determine the ownership of Connecticut property left by its erstwhile domiciliary who had gone to Nevada obtained a divorce there and then gone to California where he died.

In dissenting Mr. Justice Jackson stated, 69 S. Ct. at pp. 752 and 754:

> "Since this case involves only reappraisal of evidence, and we decline to do that, it is hard to see a reason for granting certiorari unless it was to record in our reports an example of the manner in which, in the law of domestic relations, 'confusion now hath made his masterpiece.' The question is whether property owned in Connecticut by one who has obtained a Nevada divorce and remarried in that State can be taken from his acting widow and bestowed upon the woman she superseded."
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> * * *
>
> "This Court is not responsible for all the contradictions and conflicts resulting from our federal system or from our crazy quilt of divorce laws, but we are certainly compounding those difficulties by repudiating the usual requirements of procedural due process in divorce cases and compensating for it by repudiating the Full Faith and Credit Clause. My dissenting views in the Williams and Estin cases would lead me to affirm the judgment below, because I believe this divorce was always and in all places invalid on due process grounds for want of jurisdiction of the defendant. However, if it was valid on that ground and nothing but a review of the evidence of domicile by the second state court is involved, we should not grant writs in this class of cases; but if I am to review the evidence here, I think the Nevada court's finding of jurisdiction was based on substantial evidence of domicile, not overcome by any new evidence before the Connecticut court, and the Nevada judg-

ment should be given full faith and credit as the Congress has commanded."

The question before the Court in *Johnson* v. *Muelberger*, 340 U.S. 581, 71 S. Ct. 47, was whether a third party (the daughter of a party) could collaterally attack a divorce decree entered in a suit in which the defendant had personally appeared and participated. The Court held that she could not.

In the case of *Vanderbilt* v. *Vanderbilt* (1957), 354 U.S. 417, 77 S. Ct. 1360, the Court held that a valid Nevada divorce in which defendant wife a California resident did not appear and was not personally served did not preclude the State of New York in which property belonging to the husband was located from awarding alimony to the wife in the action she brought there for separation and alimony subsequent to the Nevada divorce judgment.

The Court in *Cook* v. *Cook*, 342 U.S. 126, 2 S. Ct. 157 (also decided since the second Williams case) in remanding to the trial court simply reemphasized the well known rule that until the jurisdiction of the state in which the divorce was granted was shown to be vulnerable a sister state may not relitigate the issue of domicile on which the divorce decree rested.

In the case of *May* v. *Anderson*, 345 U.S. 528, 73 S. Ct. 840, the court held that in personam jurisdiction of the mother is required to enable the courts of a state in which she is not domiciled to award custody of minor children to the father.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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